

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION
STATE OF WASHINGTON

CONCERNED FRIENDS OF FERRY
COUNTY AND FUTUREWISE,

Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT
OF COMMERCE, AND FERRY COUNTY,

Respondents.

CASE No. 17-1-0003

**ORDER DENYING
MOTION TO DISMISS**

I. INTRODUCTION

This matter comes before the Board pursuant to Ferry County's Objection to Prehearing Order and Motion to Dismiss for lack of jurisdiction. The Board has before it the following submittals from the parties:

- Objection to Prehearing Order and Motion to Dismiss, June 2, 2017;
- Department of Commerce's Objection to Petitioner's Statement of Issue, June 5, 2017;
- Department of Commerce's Response to Ferry County's Motion to Dismiss, June 12, 2017;
- Concerned Friends of Ferry County's & Futurewise's Response to Ferry County's Objection to Prehearing Order and Motion to Dismiss and the Department of Commerce's Objection to Petitioner's Statement of Issue, June 12, 2017;
- Ferry County's Reply in Support of Objections to Prehearing Order and Motion to Dismiss, June 20, 2017;
- Concerned Friends of Ferry County's & Futurewise's Brief on Jurisdiction, June 15, 2017;

- Points and Authorities Re: Hearings Board Jurisdiction, June 15, 2017; and
- Department of Commerce's Brief on Board Jurisdiction Over This Matter, June 15, 2017.

The May 26, 2017, Prehearing Order asked all parties to brief the issue of the Board's subject matter jurisdiction to hear and decide this case in light of Ferry County's September 22, 2014, adoption of a Resolution withdrawing from full planning under the Growth Management Act (GMA).

II. LEGAL STANDARDS FOR MOTIONS TO DISMISS

The legal standards for deciding motions to dismiss are derived from the GMA, Administrative Procedure Act, and analogous Superior Court Civil Rules. The Board is authorized by the GMA to dismiss a petition for review if the petition is frivolous or if the Board finds that the person filing the petition lacks standing.¹ The Board must also dismiss a petition when the Board determines it lacks subject matter jurisdiction, since the Board has no power to adjudicate that particular case.²

Under analogous Superior Court Civil Rule 12(b), a Motion to Dismiss should be granted when (A) the Growth Management Hearings Board (GMHB) concludes it lacks subject matter jurisdiction or (B) viewing the facts in a light most favorable to the non-moving party, petitioners fail to state a claim upon which relief can be granted. Under the Board's Rules of Practice and Procedure, dispositive motions on a limited record to determine the board's jurisdiction, the standing of a petitioner, or the timeliness of the petition are permitted.³

¹ RCW 36.70A.290(3).

² See *Crosby v. Spokane County*, 137 Wn.2d 296, 301 (1999) [If a court lacks jurisdiction over a proceeding, it "may do nothing other than enter an order of dismissal"]. See also *Griffith v. City of Bellevue*, 130 Wn.2d 189, 196 (1996).

³ WAC 242-03-555.

III. ANALYSIS AND DISCUSSION

The geographic jurisdiction of the Eastern Washington Growth Management Hearings Board (EWGMHB) is prescribed by RCW 36.70A.260(1)(b):

Eastern Washington region. A three-member eastern Washington panel shall be selected to hear matters pertaining to cities and counties that are required or choose to plan under RCW 36.70A.040 and are located east of the crest of the Cascade mountains. [Underlining added]

Pursuant to legislative authorization in RCW 36.70A.040(2)(b), on September 22, 2014, Ferry County adopted a resolution removing the County from the requirements to plan under RCW 36.70A.040. Under RCW 36.70A.040(2)(b)(ii), Ferry County no longer plans under RCW 36.70A.040. So as of September 22, 2014, Ferry County became a “partial planning” county, still required to plan for, designate, and protect Natural Resource lands, Rural Areas, and Critical Areas, but Ferry County is no longer obligated to plan under RCW 36.70A.040 with the full range of GMA comprehensive planning requirements imposed on most other Washington State counties and cities.

By operation of law, Ferry County’s 2014 removal from full planning under RCW 36.70A.040 changed the EWGMHB’s ability to hear and decide appeals of Ferry County’s legislative actions. In *Victor Moore v. Whitman County*, 143 Wn.2d 96, 100 (2001), the Supreme Court held that the EWGMHB’s subject matter jurisdiction is “limited to those counties that are required or choose to plan under RCW 36.70A.040.”

RCW 36.70A.260(1)(b) and RCW 36.70A.060(1) use the same words “required or choose to plan under RCW 36.70A.040.” According to Supreme Court mandatory authority, the EWGMHB only has jurisdiction over legislative actions by counties that fully plan under RCW 36.70A.040. Ferry County does not fully plan under RCW 36.70A.040. Thus, the EWGMHB lacks jurisdiction to hear and decide appeals of Ferry County’s legislative actions.

However, in 2014 the State Legislature created a new process for partial planning counties⁴ to apply with the Department of Commerce (Commerce) for a “Determination of Compliance” with GMA’s partial planning requirements (i.e., Resource Lands, Rural Areas,

⁴ Apparently, Ferry County is the only “partial planning” county in the State of Washington.

1 and Critical Areas). RCW 36.70A.060(1)(d)(iii) provides for an appeal of this Commerce
2 determination:

3 A petition for review of a determination of compliance under (d)(i) of this
4 subsection may only be appealed to the growth management hearings board
5 within sixty days of the issuance of the decision by the department.

6 RCW 36.70A.280(1) was amended in 2014 to direct the GMHB to hear and
7 determine petitions alleging that a Department of Commerce determination under RCW
8 36.70A.060(1)(d) is erroneous.

9 Therefore, although the EWGMHB no longer has jurisdiction to hear and decide
10 direct appeals of Ferry County's legislative actions, the EWGMHB does have jurisdiction to
11 hear and decide appeals of a Department of Commerce Determination of Compliance so
12 long as the petition for review is appealed to the GMHB within 60 days of the issuance of
13 Commerce's Determination of Compliance.

14 In the present case, Commerce issued its "Determination of Compliance – Ferry
15 County" on February 28, 2017. On April 27, 2017, Petitioners Concerned Friends of Ferry
16 County and Futurewise filed their Petition for Review with the GMHB, less than 60 days after
17 the Department of Commerce Determination of Compliance. The petition requests that the
18 Board determine that the Commerce Determination of Compliance is erroneous. Thus, the
19 Board finds that Petitioners have complied with the jurisdictional requirements of RCW
20 36.70A.060(1)(d)(iii) and have successfully invoked the Board's jurisdiction to review the
21 "Determination of Compliance – Ferry County" issued by Commerce on February 28, 2017.

22 The Petition for Review presents one issue for review:

23 Did Ordinance 2016-04's designation of agricultural lands of long-term
24 commercial significance, the failure to properly zone and conserve these
25 lands, and the Department of Commerce's Determination of Compliance
26 comply with RCW 36.70A.020(8); RCW 36.70A.030(2), (10); RCW
27 36.70A.040(2), (4); RCW 36.70A.050(3); RCW 36.70A.060(1); RCW
28 36.70A.070; RCW 36.70A.103; RCW 36.70A.130(1)(d); RCW 36.70A.170(1);
29 WAC 365-190-040(8)(d); or WAC 365-190-050 or is the designation or zoning
30 consistent with the Ferry County Comprehensive Plan?
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1 Ferry County moves to dismiss the Petition for Review because the County asserts
2 "the Board lacks jurisdiction over the stated legal issue" which includes references to both
3 the Commerce Determination of Compliance and Ferry County Ordinance 2016-04, upon
4 which the Commerce Determination of Compliance is based. Commerce stated it does not
5 join in the motion to dismiss but agrees with Ferry County that the Board's scope of review
6 is narrower than that suggested by Petitioners' issue statement. It contends that scope
7 should be limited to a challenge of the issues addressed in Commerce's Determination of
8 Compliance.⁵
9

10 The Petitioners have successfully invoked the Board's jurisdiction to review the
11 "Determination of Compliance – Ferry County" issued by Commerce on February 28, 2017.
12 However, Ferry County and Commerce raise an appropriate and novel question about the
13 scope of Board review in light of Petitioners' issue statement. RCW 36.70A.060(1)(d)(iii)
14 provides no guidance other than saying Petitioners may appeal the Commerce
15 Determination of Compliance.
16

17 In this case of first impression Petitioners must keep in mind that under RCW
18 36.70A.060(1)(d)(iii), their legal arguments and briefing are limited to the matters contained
19 within the "Determination of Compliance – Ferry County" issued by Commerce on February
20 28, 2017, together with records relied upon by Commerce in making its Determination of
21 Compliance. To the extent that Commerce reviewed and relied upon certain portions of
22 Ferry County Ordinance 2016-04 in making its Determination of Compliance, it would be
23 appropriate to address those portions of Ordinance 2016-04 considered by Commerce in
24 rendering its Determination of Compliance. But the Board cannot review matters outside of
25 the Determination of Compliance and supporting documents and records.
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27 The Board finds and concludes that it has subject matter jurisdiction to hear and
28 decide this appeal of the "Determination of Compliance – Ferry County" issued by the
29 Washington Department of Commerce on February 28, 2017.
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⁵ Department of Commerce's Response to Ferry County's Motion to Dismiss at 1.

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IV. ORDER

Ferry County's Motion to Dismiss for lack of jurisdiction is **Denied**.

DATED this 10th day of July, 2017.

Raymond L. Paoella, Board Member

William Roehl, Board Member